RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

BEVERLY R. GILL, *et al.*,

Appellants,

v.

WILLIAM WHITFORD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BRIEF OF *AMICI CURIAE* THE MAJORITY LEADER AND TEMPORARY PRESIDENT OF THE NEW YORK STATE SENATE AND MEMBERS OF THE MAJORITY COALITION IN SUPPORT OF THE APPELLANTS

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STATEMENT OF THE INTEREST OF *AMICI CURIAE*

The New York State Senate is the upper house of New York's bicameral system. In the last seven years it has functioned in a variety of bipartisan coalition models. Currently the Majority Coalition is comprised of the Republican Party's elected representatives and one individual elected Democratic Party Senator, all of whom caucus together as the Republican Conference which governs in coalition with a group of eight Democratic Party senators functioning as the Independent Democratic Conference. Together this Majority Coalition, the Republican Conference and the Independent Democratic Conference, comprise the working controlling numerical majority of members. The Majority Coalition has governed the State Senate in terms of practice and policy and in turn has governed New York State in partnership with the Democratic Governor and the New York State Assembly, which the Democratic Party dominates.

Senator John J. Flanagan, a Republican is elected by vote of the Senate to be the Temporary President of the New York State Senate. He also is elected by fellow Republicans as the Majority Leader of the Republican Conference of the State Senate.[1] Senator Jeff Klein is the Leader of the Independent Democratic Conference.

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1. No party's counsel authored any part of this brief. No person other than the *amici curiae* made a monetary contribution intended to fund the preparation of this brief. Each party has represented that they have filed with the Court blanket consents to the filing of amicus curiae briefs in support of either party or neither party.

New York has two major parties, Democratic and Republican. The ballot also carries minor party candidates for offices of the Conservative, Independence, Reform, Green, Women's Equality and Working Families Parties. Each party has its own rules for the nomination, designation and endorsement of its candidates. Party identification qualifies to vote in only that party's non-open party primary elections. Voters may register as "Blank" indicating no party preference, depriving them, only, of a vote in any New York primary election. Local Senate races often include participation by additional and other parties accorded additional ballot lines established from election to election based upon highly localized issues such as lowering property taxes. Senators often are elected by the participation and votes of what are called these minor parties, either affirmatively when the candidate is on the ballot line or by drawing votes from a major party candidate when they fail to secure a minor party's endorsement.

Each State Senator serves districts mapped out by the process of redistricting. Given that the ballot cast by each voter is secret, Senators extend their services to their constituents without regard to political party. Voters cast their ballots, especially in local elections, for reasons other than pure party identification. Such reasons include candidate visibility and access, receiving constituent services, reach out programs, informational events, participation in the community, candidate personality, policy issues, socio-economic status, race, economic beliefs as well as party identification.

Adopting the social science two party based metric as accepted by the lower court would upend New York's

previously court sanctioned redistricting method. New York would be found to be engaged in "partisan gerrymandering" along with 35 other states. Similarly, an efficiency gap of greater than 10% was found in New York and eleven other states.

The Senate redistricting map, using the traditional redistricting principles, meets all the requirements for constitutional redistricting. *See, Favors v. Cuomo*, 2014 WL 2154871(E.D.N.Y. 2014) modified, 2014 WL 3734378 (E.D.N.Y. July 28, 2014).

The district court process would eliminate the very bipartisan New York Majority Coalition that the district court is trying to impose in Wisconsin. Upholding the district court, regarding political gerrymandering by formula, will directly eliminate the coalition governing the New York State Senate and create the inevitable harm of ending bipartisanship, rather than cure it.

SUMMARY OF THE ARGUMENT

The district court failed to identify or adopt a limited and precise workable standard that would be judicially manageable to determine the existence of a partisan gerrymandering such that could be identified as rising to the level of being unconstitutional. The district court held that any social science theory in effect will support a finding of partisan redistricting if it contains a claim to be able to measure of partisan asymmetry or consists of any particular technique for demonstrating the durability of the partisanship including an "efficiency gap" or other methods from recent conceptual and methodological advances in social sciences. The formula fails to take

into account vital elements of traditional redistricting, as well as actual voting patterns, which one cannot discern as party identification driven. It predicates its finding on a false equivalency of state-wide totals as providing measures for individual districts. Further, it presumes that partisan symmetry state-wide is a value in redistricting. The validity of the test is only measurable in retrospect after an election and by ignoring all reality-based variables that go into an election.

The New York State Senate is governed by a multi-party, multi-member coalition. As proffered, the district court's appeal to general social sciences matrices fails to account for a legislative coalition government as exists in the State Senate. Such a legislative coalition, transcending partisanship, cannot be measured by state-wide vote totals from legislative races. The use of a state-wide vote totals as a variable to "compare" the number of seats in the state legislature with state-wide vote totals erases voter preferences for particular candidates in particular districts based upon voter specific reasons. Ignoring the actual district by district vote for specific individuals undermines the basis of actual one person one vote jurisprudence. Perniciously, the test advances the concept of "wasted" votes, an anathema in a Republican democracy. In a representative democracy, no vote is wasted because legislators represent all their constituents. It ignores the variables of actual political representation by exalting shifting social science tests over traditional redistricting principles.

The test fails to give weight to the votes of minor parties whose vote totals provide margins of victory for state legislators in close races. The total state-wide races

of major parties do not include state-wide minor parties or the highly localized issue-based minor parties.

The proposal by the district court is fundamentally incompatible with the traditional redistricting principles that has governed the process for the last 55 years after *Baker v. Carr*, 369 U.S. 186 (1962). The district court determination would ensure that the federal courts will be intimately involved in the drawing of the state legislative lines, rather than allowing traditional redistricting principles to govern and thereby plunging each court into the picking of winners and losers by drawing the states' legislative lines itself.

ARGUMENT

Introduction

This Court first asserted that in state legislative redistricting, a claim of partisan gerrymandering was justiciable more than thirty years ago in *Davis v. Bandemer*, 478 U.S. 109,143 (1986) (plurality opinion). In 2004, this Court re visited the intractable issue in *Vieth v. Jubelier*, 541 U.S. 267 (2004) and agreed that such a phenomenon existed, but divided sharply on the justiciability of partisan gerrymandering claims, producing no standard or guidance for lower courts faced with the claim.

Vieth held unanimously that excessive partisanship in redistricting is unconstitutional. The four justice plurality acknowledged that excessive partisanship in redistricting offends the Constitution - and is therefore "unlawful" - and also that the "excessive injection of politics" into the

redistricting process is fundamentally "[incompatible] with democratic principles." 541 U.S. at 292-93 (plurality opinion). In his concurrence, Justice Kennedy agreed that "[a]llegations of unconstitutional bias in apportionment are most serious claims," explaining that severe partisan gerrymanders impose burdens "on the representational rights of voters and parties." *Id.* at 311-13 (Kennedy, J., concurring in the judgment). The four dissenters likewise agreed that partisan gerrymandering is unconstitutional. *See Id.* at 317-18 (Stevens, J., dissenting) ("The concept of equal justice under law requires the State to govern impartially[, and] ... partisan gerrymanders that are devoid of any rational justification ... cannot be said to [be] impartial[]."); *id.* at 343 (Souter, J., dissenting) (explaining that "the guarantee of equal protection condemns [some forms of partisan gerrymandering] as a denial of substantial equality"); *id.* at 355 (Breyer, J., dissenting) ("The use of purely political considerations in drawing district boundaries is not a 'necessary evil' that ... the Constitution inevitably must tolerate."). The Court, however, was unable to agree on a standard by which partisan gerrymandering claims should be adjudicated to determine what is or is not unconstitutional in the drawing of state legislative lines.

Thereafter, regarding congressional line drawing, this Court in *League of United Latin Am. Citizens* (*LULAC*) *v. Perry*, 548 U.S. 399 (2006) generated six opinions with a majority of the Court held that no identifiable constitutional flaw existed even with the seeming determination of the Texas legislature to redistrict midterm with the sole purpose of achieving a Republican congressional majority. *Id.* at 417, *see id.* at 423 (plurality opinion), *id.* at 483 (Souter, J., concurring in part) *id.* at 511 (Scalia, J., concurring in the judgment in part).

Regarding state legislative redistricting, the *Vieth* court explicitly found that no judicially discernible and manageable standards exist for adjudicating claims of political gerrymandering have emerged. *Id.*, 541 U.S. 267, 281. That finding remains true at this writing.

Into this intractable thicket, the district court in Wisconsin purports to have found the alchemical Philosophers Stone, which has otherwise eluded every other court. The majority opinion held that a state redistricting plan violates the First Amendment and the Equal Protection Clause when it is (1)"intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation": (2) "ha[d] that effect"; and (3) "cannot be justified on other legitimate grounds. *Whitford v. Gill*, 218 F.Supp.3d 837, 884 (W.D. Wisc. 2017) (three judge court) The court based both the intent and effects prongs of this test around the concept of entrenchment, the notion that the map drawing party is likely to remain in power for the entire decennial period. The district court utilized a metric labelled the "efficiency gap" (EG) calling it "corroborative evidence of an aggressive partisan gerrymander." *Whitford*, 218 F. Supp. 3d at 910.

The EG is has not been peer-reviewed or otherwise validated. It rests on a supposition as to how districts should be drawn in a two party model with voters adhering rigorously to partisanship allegiances over the subsequent decade. The test seeks to measure partisanship by the use of state-wide vote totals of the two major political parties. The test is premised upon the comparison of individual legislative seats to statewide votes. The EG seeks to measure the difference between state-wide votes for state

legislative seats from one political party compared to the actual percentage of seats held, as in a parliamentary election. No other court has required that the seats that a party's candidates win be proportional to the party's state-wide totals. No court should so hold now, given that single member districts and winner take all elections are the norm in state legislative elections.

The EG is predicated on the concept of a "wasted vote", a contrivance. It posits that a votes are "wasted" when votes are not "properly distributed." A vote is purportedly "wasted" when it is either a vote for a candidate who does not win the election or it is a vote that is surplus, cast for a winning candidate in excess of the simple majority needed to win a two party race, any vote in excess of 50% of the vote plus one. The EG is calculated by dividing the "wasted" votes for each party in an election by the overall votes cast in that election. The percentage difference is the EG. The Appellees posit further that any EG above 7% will continue to favor the party it benefits for the life of the plan, decennially, for example, in New York State. The EG equates this with a measurement of favoritism that serves to lock out a political party from holding a majority in the legislative body even if there is a huge swing in state-wide vote share. *Whitford, Id.* at 886-7.

The district court's standard and methodology fail to comport with the realities of political decision making by voters, elected officials and exalts a false value more appropriate for a parliamentary system than a republican form of government. U.S. Const. art. IV sec. 4.

I. The Efficiency Gap Is Of No Utility In Measurement Of Partisanship In Any Authentic Political System Which Functions In Coalition As In The New York State Senate

A. The Use Of A Gross Political Vote As A Measurement As To Single Member Winner-Take-All Elections Is A Dangerous And False Measurement In Objective Reality

The elusive quest for a workable standard that is limited and precise cannot be solved by the district court decision. The district court's use of social science misses the key point that the political process is not limited to winning elections. See, *Bandemer*, 478 U.S. at 132. The standard that the district court uses a purported metric that is itself unreliable and undefinable. The observation of reliable and regular phenomenon is fundamental to accurate social science. The EG makes no effort to control for or assess voter decision making, party factionalism and individual ranges of beliefs within voters and their application to a particular candidate. In multi-candidate, multi-office ballots there is ample evidence of ticket splitting which demonstrates that a vote for a candidate or a party does not directly or indirectly reflect a preference for every Democratic or Republican candidate state-wide across the state. The EG wholly ignores the local electoral issues that drive the outcomes in local ballot races.

The district court's test to determine partisanship requires acceptance of a faulty major premise to anchor its determination. The district court measured partisanship by the use of state-wide vote totals of the two major political parties. The major premise is that redistricting

demands that the proportion of state-wide votes for major party's candidates should match the proportion of legislative seats.

This premise is nowhere applicable to the conduct of representative government. A cast vote is not necessarily identification with a party and is not a correlative of partisanship. Using partisan affiliation is an eel-like measurement, given that voters ticket split, change political parties affiliation either by public registration or by secret ballot, over the cycle of the census in significant numbers. Voters clearly change political party loyalties from election to election predicated upon personal experiences, political views, public or private missteps, individual candidates and specific hot button issues.

The social science metrics fail to permit conformance with constitutional norms for its redistricting by requiring that any political party should receive a specific number of seats or a projection of party voting strength from aggregate numbers. There is no basis for such correlation with partisanship except as it related to pure political party identification by voting. It would be as if a party in this Court would win her suit based not on the number of Justices who are in the majority, but on the overall number of federal judges in the aggregate who agreed with that party.

It cannot guarantee the outcomes of an election based on voter choices, so it could be recalculated after every election and be the predicate for a challenge to the district lines every two years in New York after each election cycle. The social science does not have the value of fixed numbers as provided by Census Bureau data.

The test asserts an undefinable standard predicated upon methodology that is outcome driven. The system adopted by the district court has no controls for actual variables in local elections. It devalues actual voters' actual decision making by asserting what party should win district by district and belittling the actual votes that it purports to protect and measure. The inference that a vote for a candidate or a party directly reflects a preference for every Democrat or Republican state-wide across the state is misbegotten. The test also infers that the individual voter acts out of a desire for that particular party to achieve state-wide gains is likewise misbegotten, in a state that has long had divided government between houses of the legislature and between the governor and one house of the legislature. The gap between major political parties' representation in the Senate is closer than the state-wide vote gap, which is what aids in the creation of coalition government. Where the voters have determined that they wish a divided government by keeping the New York State Senate politically closely divided, the EG and the social science, if applied to the New York State Senate, would be skewed, based solely on the fact that Republicans hold a narrow majority, it would ironically show greater evidence of a partisan effect than a broad majority and it would likewise show entrenchment on the basis of a narrow and close number of votes, despite the fact that voters of all parties re-elect incumbents based as much on performance as on partisanship.

Even in a perfect two party ideal state, it is "no more than a rough measure at best". See, *L.U.L.A.C.*, 548 U.S. at 419 (opinion by Kennedy, J.). The EG is a concept of no practical use in any state except to allow a federal court to pick winners and losers in races for the state legislators.

See, *Vieth*, 541 U.S. at 308-309 (Kennedy, J. concurring). It is fallacious to maintain that an endless gaze at a set of raw numbers permits a court to determine a valid etiology of complex social phenomena. Even strong statistical correlation between variables does not automatically establish causation. *Ste. Marie v. Eastern R. R. Ass'n*, 650 F.2d 395, 400 (2d Cir. 1981) (Friendly, J.).

Fundamentally the EG seeks to recognize "group" based rights anchored to political party identification. Such identification by the vote in election cycles still remain both elusive and fluid from election to election, from candidate to candidate and issue to issue. Such a "group" based rights concept in the area of vote dilution has been rejected on the basis that vote dilution is individual and a claim not available to a political party. *L.U.L.A.C.*, 548 U.S. at 437. There is no authority for this "value," especially in New York where the experience in the State of New York has been shifts in control within districting periods that the EG denies could occur.

There is no state-wide party that has the authority to select candidates for individual districts. Parties are organized by each of the 62 counties in New York State with state wide party committees playing different roles once the party has selected a nominee either by primary or by a non-opposed petition. Elections for the State Legislature are single member district based. Candidates for the Senate and other local offices petition to get placed on the ballot as the nominee of their party. Party endorsed candidates do lose primary elections demonstrating that the state-wide party has no control over local candidates. The Conferences and the Coalition is an aggregation of elected members identified as district-based or county

based party candidates and political affiliations evidenced from the ballot at the last election.

Voters vote for candidates in their districts, on the basis of individual assessment of the candidate and the political options and not for a state-wide slate of legislative candidates put forward by the parties. *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring). Local legislators serve all constituents and not those of one party but their attendance at functions, distributions of information, constituent services in dealing with recalcitrant state, federal and local governments. Voters respond to individual candidates in their districts, to the constituent services they receive when needed and to positions on important issues. The right candidate at the right time under certain conditions can defeat an incumbent who loses the faith of his constituents, his political base or his popularity. The crucial defect in the lower court's decision is the presumption that under the EG and any other suggested social science standard it used is to equate political gerrymandering with deprivation of minority party's capacity to serve its constituents. It posits that only the state-wide values should control rejecting the face that local legislators evince the local interests of voters as well as those on state-wide issues. Often local legislation is not partisan issue driven and members of one political party act with member of the other party to achieve the goals of both.

Apart from the fact that each major parties' umbrella contains a wide variety of political views that defeat a factual claim of exclusion by partisanship, the EG and the social science applied by the district court fails to take into account any variable other than vote totals. It ignores

the political geography of New York State. It ignores the impact of the non-contested elections which skew results. It ignores the fact that far many more Senate districts in New York City are single party Democratic districts, where 42% of registered Democrats reside than there are single party districts of Republicans upstate. New York City overwhelmingly contributes Democratic legislators and often the sole competitive race in many local legislative district seat is the Democratic Party primary election.

In the actual political process in New York State, the term "efficiency" is of no utility in measuring partisanship, excessive or otherwise. New York along with at least eight other states, which allows candidate to run for office on multiple party lines, the EG does not work as a partisan assessment because the very concept of fusion allows for candidates to combine lines to achieve election, even to go so far as to either run with both major parties endorsement or to run unopposed by a major party in a general election.

Thus the district court's reliance in and appeal to social science fails to generate a workable standard that is limited and precise as well as reliable. As a consequence the ruling will drive federal courts deeply into unprecedented and intrusive intervention in the state legislative realm of its province of legislative districting process, not based upon the precise and limited accurately measurable core values surrounding immutable conditions, such as race, but instead upon tenuous basis with no guarantee of its own constitutionality. *Vieth*, 541 U.S. at 306 (Kennedy J., concurring in the judgment); *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

B. A State House That Governs In Coalition Between And Among Parties Voids The Presumptions In The District Court Opinion

Coalition government is designed to specifically give voice to the minority party members. In the New York State Senate, coalition governance insures that even losing voices play a role by and through the forged coalition, thus giving the lie to the district court determination of partisanship by party designation. The district court in pursuit of a misguided concept of political fairness invoked the ability of voters of a particular political persuasion to form a legislative majority. *Whitford*, *Id.* at 882-883. The district court presumes injury to the party by virtue of the claim that a losing party is completely shut out of the legislative process. Traditional Republicans and Progressive Democrats have in coalition passed laws traditionally identified with opposition parties. The social science is blind to the fact that in the New York State Senate, nine of the elected Democrats serve in coalition with the Republicans providing a majority governing coalition.

The use of political party vote as a proxy for being shut out of the political process of the majority is wholly misbegotten given the coalition influences legislation and creates adequate representation of every voice at the table of government. In certain matters, minor parties enact legislation beneficial to their communities. Large scale issues with deep ideological divisions are less likely to be imposed upon the majority coalition from minority party members, as is appropriate in a representative democracy. Coalition members, however, have an actual seat at the table in the terms of advocating for legislation and in negotiating the state-wide budget.

Coalition government allows legislators to transcend party identities in order to make the value driven decisions that voters expect of their elected representatives. It allows coalition members to bring back to their districts resources and opportunities not tied to any one political party. Individual legislators have the ability to assess and act upon local conditions not relative to party concerns but keyed to district and constituent concerns. In New York especially party identification is not always a consistent predictor of individual votes for local legislators. Coalition government is the cooperative project that allows governance to transcend the cold social science record.

In the New York State Senate it is clear that a coalition governing structure may therefore claim to be overvaluing the votes of voters in certain district when that elected Senator participates as part of the majority coalition, without regard to the political persuasion of the elected Senator. The district court's core belief that a losing political party district by district cannot form a legislative majority is belied by the reality of New York State politics.

Thus the use of state-wide numbers to then conclude that the entirety of the minority party is perforce shut out of the political process to the degree that it creates unconstitutional state districts is baseless in the reality of the New York State Senate's governance.

C. Minor Party Votes Which Are Decisive In Close Elections In The New York State Senate Are Excluded From The Wisconsin Social Science Model

The test in the district court to be even plausible requires the reduction over every election to nothing more than "D" and "R" votes on the ballot. In doing so the district court oversimplified the political process by eliminating the role of the minor parties. In the case of the minor parties their endorsement allows persons who eschew the top of the ticket of the major parties, but wish to vote for their preferred local representative, exclusive of identification with a major party. In New York, these parties include the Conservative, Independence, Green, Reform, Womens' Equality and Working Families Parties as well as the many highly localized issue-based parties. Minor parties would play no role in the EG partisan assessment under the district court model, despite the fact there is evidence of ticket splitting in the State. Local legislators often outpoll candidates higher on the ticket. Candidates draw voters for reasons that transcend political affiliations given the vast amounts of money spent, the disparate Democratic registration advantage and the ticket splitting tendencies of New York voters.

Minor parties indirectly and directly determine outcomes in local legislative races in New York State so as to undermine the use solely of major party votes. Minor parties alter outcomes of major party candidate voting patterns, either affirmatively when the candidate is on the ballot line or by drawing votes from a major party candidate when that candidate fails to secure a minor party's endorsement

Minor parties often endorse the candidate of a major party and on occasion endorse their own candidate. In New York members of the state legislature are elected by virtue of the votes of members of the two majority parties and the participation of the various state-wide minor parties and localized issue-based parties.

In the current reapportionment cycle based upon maps approved by the federal court, in the election of 2016, three Republican Senators won election or re-election based upon the votes of third parties. In 2014 one Democrat and one Republican won their election based on the vote of a third party. In the 2012 cycle, six republican senators won election or re-election on the basis of third party voters.

The participation of non-major parties is crucial to outcomes particular to certain counties or areas by occasionally provide margins of victory in local races. In state legislative races and in the New York State Senate elections, there is ample evidence of ticket splitting in local races in New York.

The social science of the district court makes no provision for such minor parties, especially where these parties do or do not endorse a major party candidate. By measuring partisanship using only the two major parties, the EG casts aside votes that express the preference that actually reflects partisanship that the test pretends to be testing.

II. Redistricting Of State Legislature Will End Up Being Endlessly Micro Managed By The Federal Courts Based Upon A Claim Of Political Partisanship Given That It Undermines Traditional Redistricting Standards.

Reapportionment of state legislatures is primarily the duty and obligation of states and not the federal courts. *Growe v. Emison*, 507 U.S. 25, 34 (1993), quoting *Chapman v. Meier* 420 U.S. 1, 27 (1975). Reapportionment by any state legislature is primarily a political task. *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973), undertaken by political actors elected for such purpose. The elusive nature of identifying partisan gerrymandering might suggest that the decades-long quest to find a workable standard with a "limited and precise rationale" to isolate impermissible levels of partisanship, regarding state legislatures be abandoned to the measurement of traditional redistricting principles and assessing invidious discrimination. Use of the EG alone would invalidate New York's redistricting plan just recently approved by a three judge court. *Favors v. Cuomo*, 2014 WL 2154871(E.D.N.Y. 2014) modified, 2014 WL 3734378 (E.D.N.Y. July 28, 2014).

Even if a federal court can decide how much partisanness is too much, it is making an exclusively political judgment committed to the states as one of the most significant acts a State can perform to ensure citizen participation in self-governance. *LULAC*, 548 U.S. at 415. The coalition in the New York State Senate reflects the effects of citizen participation by their votes in individual districts maintains a relatively stable legislature in which a minority party retains significant representation *Vieth*, 541 U.S. at 360 (Breyer, J. , dissenting).

The standard such as it is proposed by the district court is assuredly a recipe for epic amounts of litigation in federal courts over state legislative lines, even when they meet all traditional redistricting principles such as compactness, contiguity, respect for political subdivisions, core communities, communities of interest, *Miller v. Johnson*, 515 U.S. 900, 916 (1995) and other requirements of traditional redistricting, including protecting incumbents and political affiliations, *Ala. Leg. Black Caucus v. Alabama*, 134 S. Ct. 1257, 1270 (2015). Because any voter or organization can make themselves a plaintiff redistricting litigation becomes the vehicle for those whose failures at the ballot box an opportunity to overturn the actual will of the voting public.

The *Favors* litigation is instructive regarding the potential consequences of affirmance of the district court decision. After the failure of the two houses of the legislature to agree upon Congressional lines, a three judge court was forced to draw the Congressional lines. A state plan proposed by the then pre coalition Republican controlled Senate majority and the Democratic controlled Assembly was adopted and signed into law by the Governor. Thereupon various individuals and organizations sued to overturn the State plan and impose their variants of plans based either upon racial, ethnic, religious or other demographics. Plaintiffs sued the Governor and the majority and minority party legislative leaders. In the course of the litigation, the putative defendant, the then-Senate Minority Leader, having been unable to command enough votes to defeat the bill in the Senate chamber, functionally aligned with plaintiffs in seeking to defeat the enacted plan. The lion's share of the litigation devolved down to a contest between the Senate Minority

defendants seeking to overturn the enacted plan defended by the Senate Majority defendants and with nothing to lose politically, seeking to seize a victory in the courts denied to them on the floor of the Senate. The case stretched over four years culminating in the three judge court finding that the plans of Senate in particular was constitutionally proper according to traditional redistricting principles.

Should the district court be affirmed, the redistricting process in the states will be a prelude to the guaranteed litigation in federal court by any one political actor aggrieved, any loser in the exercise of representative democracy or a political gadfly. The addition of more "metrics" will bring every crook and nanny (and every organization that funds or controls them) into federal court as a private litigant against the re districting lines convinced they are gerrymandered into oblivion. See, e.g. *Loeber v. Spargo*, 391 Fed. Appx. 55 (2d Cir 2010). No cycle will be free from litigation poised to claim any social science metric tested or otherwise as a means to tie up functional government with the obligation to defend its political realities to a federal court with little or no experience of the political geography or factors of the state of New York.

The federal court litigation will begin with a rummage through the social sciences to find any "test" that could be asserted to claim partisanship and will culminate in a mud wrestling of experts. The result is that the federal courts will be in the business of picking winners and losers out of the caldron of social science.

The standard should not impose greater uncertainty, nor should it not be discernible or manageable by the

state actors to whom the obligation of redistricting is constitutionally delegated. No state legislator would be able to securely enact a plan confident that it meets constitutional requirements. Good faith attempts to follow traditional redistricting principles will be of no value. There will be no way to divine what will comply with what is now to be an ever-shifting elusive constitutional standard set by the federal courts over the state re districting process. No legislature could draw lines that would protect it from federal litigation and no party will know how a future district court would identify a social science value and impose it.

The consequence of upholding the metric accepted by the district court will be that no redistricting process will ever end by the acts of the state legislature as was contemplated by relegating re districting to the states. Instead, the losers in the state process will rush through the doors of the federal courthouse to the detriment of representative government in the states.

And only the federal court will be able to determine each and every claim against a legitimately drawn map because no one will have a thread of an idea of what social science metric could govern the redistricting. The courts will assume political responsibility for a process that itself is fraught with ill will and distrust as demonstrated by the litigious nature of redistricting. Further the result will be unprecedented costly and time consuming litigation initiated by the rival political party, as was done in *Favors*, where the Senate Democrats separately litigated against the Senate Majority. See, *Favors*, *Id.* The consequence will be a ten year anniversary of docket busting redistricting cases which drag on almost until the next census and

then it all begins again. By the time a redistricting plan is sanctioned by a federal court, it will be time to begin a new round of line drawing into the vacuum. In effect a permanent consent decree will be the consequences of the amorphous standard of the district court. State legislatures and state voters are entitled to a degree of certainty and to be free from repeated invasion by the federal court.

CONCLUSION

For the foregoing reasons, amici, New York State Senate Temporary President and Republican Coalition Leader respectfully requests that the Court reverse the lower court's decision.

Respectfully submitted,

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August 4, 2017

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